FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 636

WEST VIRGINIA NORTHERN RAILROAD COMPANY,
Petitioner

versus

GEORGE PRITT, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, AND BRIEF IN SUPPORT THEREOF.

HARRY H. BYRER, Martinsburg, W. Va.
F. E. PARRACK, Kingwood, W. Va.
MELVIN C. SNYDER, Kingwood, W. Va.
CHARLES V. WEHNER, Kingwood, W. Va.
Counsel for Petitioner.

HARRY H. BYRER,
F. E. PARRACK,
Of Counsel.

MORGANTOWN PRINTING AND BINDING CO. MORGANTOWN, WEST VIRGINIA

SUBJECT INDEX

TABLE OF CASES CITED

IN

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.....

WEST VIRGINIA NORTHERN RAILROAD COMPANY,
Petitioner,

versus

GEORGE PRITT, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of West Virginia Northern Railroad Company respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The Supreme Court of Appeals of West Virginia, on December fourteenth, 1948, made and entered an opinion and order which affirmed a judgment made and entered by the Circuit Court of Preston County, West Virginia, on November 14, 1947, in favor of respondent, George Pritt, and against the petitioner, West Virginia Northern Railroad Company, for twenty thousand

(20,000) dollars, with interest from the fourteenth day of November, 1947, and costs, (R. 59), in an action of trespass on the case then pending in said Circuit Court, in which respondent was plaintiff and petitioner was defendant.

Petitioner for many years prior to March 7, 1946, and on that date, owned and operated a railroad about eleven miles long in Preston County, West Virginia between Kingwood and a junction of said railroad with the Baltimore and Ohio Railroad at Tunnelton.

Privately owned mines, at various points, were connected with petitioner's railroad by side tracks of the mine owners and one such mine and sidetrack between one and two miles from Tunnelton, was owned by M. P. Blake who traded as Blake Coal Company.

Petitioner employed respondent as brakeman from January 1, 1942, to August 6, 1942, and from October 15, 1945, to March 7, 1946 (R. 29).

On March 7, 1946, twenty empty cars were brought from the exchange tracks of the Baltimore and Ohio railroad to the Blake siding by two engines and a train crew of petitioner's consisting of two engineers, two firemen, a conductor and respondent as brakeman (R. 84 and 85). The cars were for distribution to various mines and one was to be placed under the Blake tipple.

The declaration alleges there were twenty two cars, but the proof shows but twenty. The variance is unimportant.

Before entering on the Blake siding, the train stopped and respondent, by orders of the conductor, uncoupled the car next the lead or front engine from the other cars of the train, thus cutting off that car and the engine from the other cars of the train; the respondent, signaled the engineer forward, climbed the rear ladder of the car, which was pulled past the switch; respondent threw the switch, signaled the engineer to reverse, climbed the ladder at the end of the car and set the brake as the car was slowly pushed back over the sidetrack to and under the tipple.

The conductor took the numbers of the other empty cars, then crossed over to the tipple. Respondent standing on the brake platform, had set the brake on the car and the wheels were sliding when the conductor came to the tipple.

The Supreme Court of Appeals of West Virginia says the car was, at the switch, "cut off from the locomotive." That is error, as we shall show in our brief hereto attached; the record shows the car's every movement was controlled by the engine.

Respondent says, as the car was being pushed by the engine under the tipple, when about 15 feet from the tipple, he observed the end of the car was of unusual height. He threw his arm around the brake wheel, and the arm was struck by an overhead timber of the tipple, which caused him to fall. (R. 87). When he fell the car had practically stopped. It moved but a few feet.

E. C. Morris says petitioner's feet may have been six feet back under the car, and his head was from four to four and one-half back. (R. 203).

Albert Grimm says when respondent fell he, Grimm, tried to pull respondent away from the car, but could not, and that the car moved "in the neighborhood of 3 feet or better" after he let go of respondent (R. 150).

A rod connected with the brake held respondent so he could not be drawn from under the car, and it was unsafe to pull the car from over him (R. 151). The car was jacked up sufficiently to take respondent from under it.

Petitioner sent a physician and ambulance to the scene, and respondent was taken to a Clinic in Kingwood, and later removed to a hospital in Morgantown, West Virginia.

From the enactment of the Workmens' Compensation Law of West Virginia in 1913, to the present time petitioner subscribed to the compensation fund. While it employed respondent, it paid premiums into the fund on his wages and those of other employees.

Because of his injuries, respondent on April 5, 1946, applied for an award of compensation, and was granted an award of $18.00 per week from the date of his injury, to continue until he returned to work, or was certified for employment, by an attending physician.

Respondent was still drawing compensation when his said action at law against petitioner was tried. All his hospital, doctor, nurse, ambulance and other expenses were paid from the compensation fund. His action was instituted under the Federal Employers' Liability Act, at the February Rules, 1947.

By demurrer, petitioner challenged the sufficiency of the charges of duties and neglect of such duties made by the declaration, (R. 82), and it also filed a general issue plea and a special plea called "Defendant's Plea Number 2" (R. 36).

THE DECLARATION

Respondent's declaration (R. 21 to 31), avers that Respondent was employed by petitioner; that petitioner was engaged in interstate commerce; that it had supervision of the Blake tipple and side track because it had a right to refuse to place cars under the tipple, and to remove them therefrom unless satisfied that track and tipple could be used without risk by petitioner's employees; that petitioner "permitted" Blake to place the tipple over the side track "with sufficient clearance for the normal sized cars * * * for the employees of defendant to place empty cars under said tipple without any unnecessary risk to life or limb;" that for "approximately" twenty years the side track and tipple were used without injury to defendant's employees, and "without danger of injury when cars of normal height were used" (R. 24).

The trial court overruled petitioner's demurrer to the declaration, and held it sufficient. Respondent demurred to the Petitioner's Plea Number 2, and the trial court sustained said demurrer.

The Supreme Court of Appeals in its order and opinion, found that the declaration contained but one charge that was

sufficient basis to impose liability on petitioner. That was a charge that the car being placed under the tipple was of extraordinary height and had an extraordinarily high brake wheel, and that the clearance between the brake wheel and the overhead timbers of the tipple was not sufficient, and that the petitioner was negligent because its officers and agents should have observed the height of this car and should not have ordered it placed under the tipple.

The declaration nowhere alleged the height of the car, nor of the tipple timbers. The Supreme Court of Appeals of West Virginia states that there was only a clearance of one inch between the Norfolk and Western car being placed by respondent and the overhead timbers of the tipple; but when cars of average height were used there was a clearance of from 22 to 23 inches (51 S. E. 2d, 109). The record does not sustain this conclusion.

Floyd Wheeler says, "some standard sized railroad cars, I would say there was 22 to 23 inches clearance *from the top of the car up to the ceiling.*" (Emphasis supplied) (R. 143). He says the height of a B. and O. car, which he calls a standard car, from the top of the rail is about 132 inches.

When this witness speaks of the top of the car, he is not speaking of the brake wheel and staff, which are outside of and rise above the body of the car. He says the height of the *brake wheel* of the Norfolk and Western car was 145 inches (R. 145).

As we explain more fully in the brief hereto attached, the Court in speaking of a clearance of 22 to 23 inches, is dealing not with the clearance above the brake wheel, but above the top of the end of the car body; and in speaking of the Norfolk and Western car clearance, it is referring to the clearance above the brake wheel. Neither the pleadings nor the evidence show such difference between the height of the brake wheel of the Norfolk and Western car and that of the average car, if the B. and O. car is average, as warned the petitioner or its servants and employees of any especial danger in placing the Norfolk and Western car. Cars of that height and make had frequently been put under that tipple while respondent was employed by petitioner.

Petitioner's Plea No. 2 showed the fact that respondent had made application for the aforesaid award of compensation, had received such award, and was still enjoying the benefits thereof. The Court sustained a demurrer tendered by respondent to that plea. In the course of the trial petitioner offered evidence to prove the making of the award and receipt of benefits. The Court excluded such evidence, and in the absence of the jury petitioner proved the facts, and thereafter asked to be permitted to have the questions and answers relating to said award read to the jury, which request was refused by the trial court. The Supreme Court of Appeals of West Virginia affirmed such action of the trial court. That was error.

NOTE: In referring to the report in the instant case, as found in 51st S. E. 2d, we call attention to the fact that the editor of the Reporter makes up a syllabus of thirty points, referring to the different points disposed of and determined in the opinion of the Court; but the syllabus as made by the Court itself has but three points.

INSTRUCTIONS GIVEN AND REFUSED

The Court, over petitioner's objection, gave for respondent instructions styled "Plaintiff's Instructions" numbers 3, 5, 6 and 7. It refused Number 1, and Number 2 was withdrawn.

Upon the trial many exceptions were taken by petitioner to the rulings of the Court, as shown by the record.

Respondent's Instruction Number Three, given for respondent, in effect told the jury that by directing respondent to cut the car in question out of the train and place it under the tipple, petitioner carelessly and needlessly exposed respondent to risk and damage not necessarily resulting from his occupation, and which might have been prevented by reasonable care and precaution (R. 45).

Respondent's Instruction Number Five denied to the petitioner all benefit of payments made to respondent from the Workmen's Compensation Fund (R. 47).

Respondent's Instruction Number Seven submitted to the jury the question whether petitioner was negligent (R. 49). There being no dispute as to the facts, the question of whether there was such negligence was one for the Court.

Petitioner believing that the evidence did not justify a verdict for respondent, prayed for a peremptory Instruction, "No. 1." (R. 51).

Petitioner's Instructions Numbers 2 and 2-A were withdrawn, because by refusing all evidence of payments made to respondent under the compensation award, the Court left no evidence in the record to justify said instructions.

The Court refused petitioner's Instruction Number 4, which would have told the jury that the defendant was not the insurer of the safety of an employee, nor bound under all circumstances to provide a safe place for the employee to work, but that it discharged its duty by using reasonable care to furnish its employees with a safe place to work, and that the sudden happening of an accident not foreseeable by the exercise of reasonable care, did not render it liable. That, petitioner believes, was a misconception of the terms and requirements of the Federal Employers' Liability Act. (R. 53-54).

Petitioner's Instruction No. 5 was withdrawn, but the substance of it was included in its Number Seven. The Court refused to give petitioner's Instruction Number Six, which would have told the jury to disregard all allegations of the declaration of a duty upon petitioner to have two brakemen, instead of one.

The Court refused petitioner's Instruction Number 7, which would have told the jury to disregard the statements in the declaration of the failure of petitioner to have two brakemen instead of one, and to have someone walk ahead of the car as it was being placed under the tipple. Although the Court refused to give that instruction, it drew red lines across the part of the declaration relating to the duty to have someone walk ahead of the car.

The Court refused petitioner's Instruction Number 10, which would have told the jury to disregard the charge of the declaration against the petitioner; that it was its duty to make rules, etc. (R. 57).

The jury returned a verdict for the plaintiff, in the sum of $20,000.00 (R. 43). Petitioner moved the Court to set aside the verdict and grant petitioner a new trial (R. 43-57-58). The Court overruled said motion, and entered judgment on the verdict in favor of respondent against petitioner, in the amount of the verdict, with interest and costs. The Supreme Court of Appeals of West Virginia granted a writ of error and supersedeas to said judgment, February 16, 1948. (R. 20).

On December 14, 1948, said Supreme Court of Appeals affirmed said judgment, and made a written opinion now reported in 51 S. E. Reporter 2d, pages 105 to 119, inclusive.

In the trial court and in the Supreme Court of Appeals of West Virginia petitioner claimed and sought to have each court hold:

(1) That no negligence of petitioner was alleged in the declaration nor proved on the trial which, under the Federal Employers' Liability Act, gave respondent a cause of action against the petitioner.

(2) That if the injury complained of was caused by negligence it was the sole negligence of respondent.

(3) That the proceedings before the Compensation Commissioner, and the continuing receipt of payments under his award were a bar to respondent's action.

(4) That if such proceedings and payments did not bar the action, any sum which a jury might believe sufficient recompense for respondent's injury, if the jury found for respondent, should be reduced by the payments made under the award of compensation to respondent, or for his benefit.

BASIS ON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION

(1) The Supreme Court of Appeals of West Virginia has in this matter decided Federal questions of substance in a way probably not in accord with applicable decisions of this Court.

(2) Respondent claimed herein a right to recover damages from petitioner under a statute of the United States. That is, under Section 51 of Title 45 of the United States Code, which gives to an employee of a common carrier by railroad, injured by negligence of his employer, a right to recover from the employer damages for such injury, and under Section 53 of said title, which bars the defense in such actions, of contributory negligence, and under Section 54 of said Title, which abolishes in such actions the defense of assumption of risk.

(3) The Supreme Court of Appeals of West Virginia is the highest court of said state. Its decision in this matter is final.

(4) The questions presented are questions of substance:

a. Whether the indefinite charge that the railroad car was of "extraordinary height," and a brake wheel "extraordinarily high," and therefore petitioner's agents, employees, etc., should have observed its height, that being the only part of the declaration held not demurrable, was sufficient to require petitioner to make a defense under the Federal Act.

b. Whether it was not error for the trial court to admit evidence of acts of alleged negligence insufficient to impose liability, and to refuse instructions to the jury, upon request, to ignore such evidence, and for the Supreme Court of Appeals to hold that it was not error to submit such evidence, and to refuse to instruct the jury to disregard it.

c. Whether one pursuing his remedy in court under the Federal Employers' Liability Act may before instituting his action obtain compensation payments and receive therefrom large sums of money, and without surrendering same, but while still

drawing such payments, assert in his action that he was not entitled to such payments. This was decided contrary to the applicable decisions of this Court in Railroad Company v. Schendel, 270 U. S., 235.

B.

QUESTIONS PRESENTED

1. Did the Compensation Commissioner have jurisdiction to determine whether respondent's injuries were compensable?

2. Was the award of compensation, not appealed from by petitioner, sought and accepted by respondent, res adjudicata as to whether respondent was, when injured, engaged in interstate commerce, and was said award final as to other facts essential to the making thereof?

3. Does the Federal Employers' Liability Act permit respondent to deny that he was entitled to the award of compensation sought by him, and of which he enjoyed the benefits for almost a year and to make such denial without refunding or offering to refund payment received?

4. May the Federal Employers Liability Act be used a means by which to obtain double pay for the same injury?

5. Did the declaration charge any actionable negligence which caused respondent's injury, or proximately contributed thereto?

6. Was the evidence sufficient to establish any actionable negligence on the part of petitioner?

7. The trial court, by overruling petitioner's demurrer to respondent's declaration, held sufficient and a basis for recovery, a declaration which in effect made petitioner an insurer of the safety of respondent, and imposed on petitioner duties not required by the common law or by the Federal Employers' Liability Act. That is, a duty to inspect or measure each empty car delivered to it by a connecting carrier; to make and enforce

rules for the doing of such simple and ordinary duties of a train crew as placing an empty car on a side track; to have two brakemen, instead of one in the movement of twenty empty cars; a duty to carry on its engines jacks, stretchers, blankets and other first aid equipment; a duty to keep a conductor or some other person in position to protect respondent from injury; a duty to have some employee walk ahead of an empty car which is being placed under a coal tipple. Was that error?

SPECIFICATIONS OF ERROR

Petitioner submits that the Supreme Court of Appeals of West Virginia in its decision and determination of this cause erred in the following particulars:

1. Said Supreme Court of Appeals erred in affirming the judgment of the Circuit Court of Preston County, West Virginia, and in not reversing said judgment.

2. Said Supreme Court of Appeals erred in finding that it was not error for said Circuit Court to overrule petitioner's demurrer to respondent's declaration, and that it did not err in not sustaining said dumurrer.

3. Said Supreme Court of Appeals erred in sustaining respondent's demurrer to petitioner's plea "Number Two", and in not overruling the demurrer to said plea.

4. Said Supreme Court of Appeals erred in deciding that under the pleadings and proof in the case, the question whether petitioner's business was interstate or intrastate was for jury determination.

5. Said Supreme Court of Appeals erred in deciding under the pleadings and proof in this action that respondent was when injured engaged in interstate commerce and was entitled to maintain this action under the Federal Employers' Liability Act.

6. Said Supreme Court of Appeals was in error in holding that the award of compensation made to respondent by the Compensation Commissioner of West Virginia was void.

7. Said Supreme Court of Appeals erred in adjudging and deciding that it was not prejudicial to the petitioner for the trial court to exclude all evidence of payments of compensation by the Compensation Commissioner of West Virginia to the respondent under the award above mentioned.

C.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT:

1. It is important to establish such rules of pleading procedure and instructions in all courts state and Federal as will insure uniformity in trials under the Federal Employers' Liability Act, and that to that end this court review the actions of inferior courts based upon the Federal Statutes. (Brady vs. Railway Co. 320 U. S. 476).

2. The Supreme Court of Appeals of West Virginia by its order and opinion holds that in respondent's declaration there are many charges of duty and breaches of said duty which should have been stricken out by the trial court had a motion been made for that purpose. The opinion eliminates as grounds of recovery every part of that declaration except the charge that petitioner failed to furnish a safe place for respondent to work in that it ordered petitioner to cut off from a train of empty cars the one next to the front engine and to place it under the tipple.

The tipple was one with which respondent was quite familiar. The car was of a height and character commonly handled by petitioner and delivered to it by the connecting carrier, and ninety-four cars of similar make and height had between October 15, 1945 and March 7, 1946, while respondent was employed by petitioner, been placed under that tipple. (R. 217 and 218).

The trial court overruled petitioner's demurrer to the declaration and admitted evidence to prove that petitioner did not make and enforce special rules for placing cars on side-tracks and under tipples; that it did not carry jacks, stretchers, blankets, etc. on its engines; that it did not have two brakemen instead of one with this train of cars.

The Supreme Court of Appeals of West Virginia should have set aside the verdict for the admission of this evidence to prove wholly immaterial and improper allegations. It states "we find no reversable error in the admission or refusal to admit testimony in the trial of the case." (51 S. E. 2d, 119 – column 1).

3. The trial court having admitted evidence as above shown and having overruled the demurrer to the declaration which contained a charge of a breach by petitioner of an alleged duty to have someone walk in front of the car as it was being placed refused petitioner's requested Instruction Number Five; and admitted evidence of a failure of petitioner to have two brakemen instead of one, and then refused Instruction Number Seven, prayed for by the petitioner, and thus admitted evidence of a breach of an alleged duty of petitioner to make special rules, etc. the trial court refused Instruction Number Ten prayed for by petitioner, and the Supreme Court of Appeals of West Virginia should, we believe, have for that reason reversed the judgment entered by said trial court, and in reaching its conclusions the said supreme court of appeals cites the Federal Employers' Liability Act and particularly such part of section fifty-four as provides that in such actions the employee "shall not be held to have assumed the risk of his employment."

4. The Supreme Court of Appeals of West Virginia in its opinion holds: That Instruction Number Four prayed for by petitioner "may not be defective", but that it was calculated to mislead the jury and that it was not reversable error for the trial court to refuse to give it. (51 S. E. 2d 119 – column 1).

We believe that instruction embodied the interpretation of the Federal Employers' Liability Act as made by this court in the case of Brady vs. Railway Company, supra, and of Eckenrode vs. Pennsylvania Railroad Company (Advance Sheets of Supreme Court Reporter, December 1, 1948, page 91), and that because of that ruling the writ prayed for should be allowed.

5. The writ prayed for should be allowed because the Supreme Court of Appeals of West Virginia has erroneously held in its opinion hereinabove referred to that it was not error in the trial court to reject the evidence offered by petitioner to prove pay-

ments made from the Workmen's Compensation Fund of West Virginia to the respondent and that the application by respondent to the Compensation Commissioner of West Virginia for an award of compensation, the fact that such award under the Statute of West Virginia became final and was never appealed from and that the respondent was continuing to enjoy benefits under said award at the very time of the trial of this action and that such award was not res adjudicata as to respondent having been engaged in intrastate commerce at the time of his injury, and as to all other matters necessary to the making of such award was contrary to the applicable decision of this court in Railroad Company vs. Schendel, 270, U. S. 235.

6. The writ prayed for should be allowed because if the award made by the Compensation Commissioner of West Virginia to the respondent was not res adjudicata as above contended for, petitioner was entitled at the least to have deducted from any sum which the jury might find would compensate respondent for his injuries the amount paid to respondent, or for him by the compensation commissioner, and the Supreme Court of Appeals has erroneously decided that the trial court committed no error in refusing to admit any evidence of the payments from the compensation fund.

Magnolia Petroleum Co. vs. Hunt, 320 U. S. 430.

Petitioner believes that the grounds set forth upon which the writ of certiorari herein is sought are substantial in that upon them is founded respondent's sole right to recover in this case, and because the determination thereof is essential to clarify the question of the extent of the duty of a railroad company to foresee and avoid dangers which arise from the character of work being performed rather than from any negligence on the part of such company.

Petitioner believes that reasonable care to provide a safe place for respondent to work did not require that petitioner should apprehend or expect that respondent would be injured in placing the Norfolk and Western car under the tipple.

Petitioner believes that if this finding and opinion of the Supreme Court of Appeals is correct, then demurrer should have

been sustained to the declaration as failing to state a cause of action, and that the evidence as to any negligence in that respect was wholly insufficient to justify submitting the case to the jury; and that it was error for the trial court to refuse to give petitioner's Peremptory Instruction No. 1 prayed for by it (R. 51); and that for that reason the Supreme Court of Appeals of West Virginia should have reversed the judgment rendered by the trial court against petitioner.

A certified copy of the entire record is herewith presented, and there is appended hereto a supporting brief.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Appeals of West Virginia, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 10047, George Pritt, Plaintiff Below, Defendant in Error, vs. West Virginia Northern Railroad Company, a corporation, Defendant Below, Plaintiff in Error; and that said judgment and the order of the Supreme Court of Appeals of West Virginia may be reversed by this Honorable Court; and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem just.

And your petitioner will ever pray.

WEST VIRGINIA NORTHERN RAILROAD COMPANY
Petitioner,

By HARRY H. BYRER
F. E. PARRACK
M. C. SNYDER
C. V. WEHNER
Counsel for Petitioner

HARRY H. BYRER,
F. E. PARRACK,
Of Counsel.

APPENDIX B

The applicable parts of the Workmen's Compensation Law of West Virginia, to save space and for the purpose of convenience, we merely refer to certain parts of this law without quoting the same in full.

Chapter 23 of the Code of West Virginia of 1913, Article 1, Section 1, provides that there shall be a Compensation Commissioner, and fixes his qualifications. Intervening sections provide for expense of administration, salaries, office hours, records, etc.

Section 5 of Article 1, provides:

"The commissioner shall keep and maintain his office at the seat of the government, and shall provide a suitable room or rooms necessary, office furniture, supplies, books, periodicals, maps and other equipment. After due notice, showing the time and place, the commissioner may hold hearings anywhere within the state, or elsewhere by agreement of claimant and employer, with the approval of the commissioner."

Article 1, Section 8:

"The commissioner, secretary and every inspector or examiner appointed by the commissioner shall, for the purpose contemplated by this chapter, have power to administer oaths, certify official acts, take depositions, issue subpoenas and compel the attendance of witnesses and the production of pertinent books of accounts, papers, records, documents and testimony."

Article 2, Section 1, reads in part:

"All persons, firms, associations and corporations regularly employing other persons for the purpose of carrying on any form of industry or business in this state are employers within the meaning of this chapter, and subject to its provisions.

"All persons in the service of employers as herein defined, and employed by them for the purpose of carrying on the industry, business and work in which they are engaged, including persons

regularly employed in the state whose duties necessitate temporary employment by the same employer without the state of a temporary or transitory nature, and check-weighmen employed according to law, and all members of rescue teams assisting in mine accidents with the consent of the owner who, in such case, shall be deemed the employer, or at the direction of the chief of the department of mines, are employees within the meaning of this chapter and subject to its provisions."

This section excepts employers of employees in domestic or agricultural service, persons prohibited by law from being employed, employees employed without the state except in temporary employment, members of a firm of employers and officers and managers of associations or corporations and elective officials of the state.

Article 2, Section 3 of such chapter provides for blanks for reports, and further as follows:

"Every employer receiving from the commissioner any blank or blanks with direction for filling out and returning the same shall return the same filled out so as to answer fully and correctly all pertinent questions therein propounded, and if unable to do so, shall give good and sufficient reasons for such failure." It further provides the method of making applications by employers to said compensation commissioner.

Article 2, Section 4 provides for the classification of industries, and the amount of premiums to be paid in the separate classes.

Article 2, Section 5 reads in part as follows:

"For the purpose of creating a workmen's compensation fund each employer subject to this chapter shall pay the premiums of liability based upon and being such a percentage of the payroll of such employer as may have been determined by the commissioner and be then in effect. * * * All sums received by the state compensation commissioner as herein provided shall be deposited in the state treasury to the credit of the workmen's compensation fund in the manner now prescribed by law for depositing money in the state treasury.

"Each employer will make a payroll report to the commissioner on or before the twentieth of each month for the preceding month, and such report shall be on the form or forms prescribed by the commissioner, and furnish all information required by him."

Article 2, section 8 of said Chapter deprives employers subject to the chapter who have not elected to pay into the workmen's compensation fund of the defense of fellow-servant rule, assumption of risk or contributory negligence in case of suits by employees on account of injuries caused by the negligence of the employer.

Article 2, section 9 of said Chapter provides for employers providing their own system of compensation and establishes the method of their doing so.

Article 2, section 10 of said chapter reads in part as follows:

"Unless and until the congress of the United States has by appropriate legislation established a rule of liability or method of compensation governing employers and employees engaged in commerce within the purview of the commerce clause of the Federal Constitution (article one, section eight), section one of this article shall apply without regard to the interstate or intrastate character or nature of the work or business engaged in: Provided, however, That this chapter shall not apply to employees of steam railroads, or steam railroads partly electrified, or express companies engaged in interstate commerce."

Article 3, section 1 provides:

"The commissioner shall establish a workmen's compensation fund from the premiums and other funds paid thereto by employers * * * for the benefit of employees of employers who have paid the premium applicable to such employers and have otherwise complied fully with the provisions of section five, article two of this chapter, and for the benefit of the dependants of such employees, and for the payment of the administration expenses of this chapter, * * *.

Ten percent of all that shall hereafter be paid into the workmen's compensation fund shall be set aside for the creation of a surplus fund until such surplus shall amount to the sum of five hundred thousand dollars • • •."

Article 4, section 1 of said chapter reads as follows:

"Subject to the provisions and limitations elsewhere in this chapter set forth, the commissioner shall disburse the workmen's compensation fund to the employees of such employers as are not delinquent in the payment of premiums for the month in which the injury occurs, and who have otherwise complied fully with the provisions of this chapter, and which employees shall have received personal injuries in the course of and resulting from their employment in this state, or in temporary employment without the state, as defined and limited by section one, article two of this chapter, or to the dependants, if any, of such employees in case death has ensued, according to the provisions hereinafter made; and also for the expenses of the administration of this chapter, • • •.

IN

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No.....

WEST VIRGINIA NORTHERN RAILROAD COMPANY,
Petitioner,

versus

GEORGE PRITT, *Respondent.*

BRIEF IN SUPPORT OF PETITION

This brief in support of the petition for writ of certiorari seeks to reverse the judgment of the Supreme Court of Appeals of West Virginia, made and entered on December 14, 1948, in the action at law in trespass on the case of George Pritt v. West Virginia Northern Railroad Company, the style of the case in said Supreme Court of Appeals being "No. 10047, George Pritt, Plaintiff below, Defendant in Error, v. West Virginia Northern Railroad Company, a Corporation, Defendant Below, Petitioner in Error.

STATEMENT OF THE CASE

In the interest of brevity this Court is respectfully referred to the petition for a Writ of Certiorari herein, in which is recited a statement of the facts, as well as a statement of the history of the case, and of the action of said Supreme Court of Appeals of West Virginia.

The statute involved is Sections 51 to 60, both inclusive, of Title 45 of the United States Code, being the statute commonly known as the Federal Employers' Liability Act.

SUMMARY OF ARGUMENT

I

The Federal Employers' Liability Act does not make the employer an insurer of the safety of his employees.

It is not the absolute duty of the employer under all circumstances to furnish the employee a safe place in which to work, but the employer fulfills his duty when he uses reasonable care to furnish such safe place.

Echenrode v. Railroad Company, 69 S. C. R. 91;
Wilkerson vs. McCarthy, 69 S. C. R. 414;
Reynolds vs. Atlantic Coast Line Ry. Co. 36 So. 2d, 102;
Brady v. Southern R. Co., 320 U. S. 476;
Southern R. Co. vs. Bradshaw, 37 S. E. 2d, 150.
The Cricket, 71 Fed. 2d, 61;
Lindville v. Ry. Co., 115 W. Va., 610, Point 2.

II

The trial court erred in refusing to give Instruction Number Four prayed for by petitioner, and the Supreme Court of Appeals of West Virginia, in affirming the judgment of said Circuit Court, and in determining and deciding that though technically correct, such instruction was calculated to mislead the jury, and that it was not reversible error to refuse it, disregarded the applicable decisions of this Court, and erred to the prejudice of petitioner.

See Point 29 of Syllabus 51 S. E. 2d, 108.
See also cases cited under I.

III

The averments of the declaration are insufficient to justify a trial by jury of respondent's action against petitioner.
See above cited cases.

IV

The evidence on the trial was insufficient to justify submitting the issue in the case to a jury. Said evidence showed that if respondent's injury was the result of negligence it was the sole negligence of the respondent himself, and that there was no negligence on the part of petitioner.

Brady v. Southern Ry. Co., Supra, Points 1 and 2.

V

Whether there was sufficient proof of negligence to sustain the verdict and judgment is for final determination by this Court, to establish a uniform Federal Rule to be followed by all States.

Brady v. Ry. Co., Supra, Point 1 and 2.

VI

Until its decision in this case the uniform holding of the Supreme Court of Appeals of West Virginia was that a master has discharged his full duty to his servant as to furnishing a safe place to work when he has used due and reasonable care to that end, and that he is not required to anticipate the unforeseeable. This is in accord with the almost universal rule.

Whorley v. Lumber Co., 70 W. Va., 122; Point 2.
Griffin v. Railroad Co., 96 W. Va. 302.
Scott v. Railroad Co., 100 W. Va., 88.
Statin v. Railroad Co., 119 W. Va., 658.

That is the Federal Rule, and it is not altered by the Federal Employers' Liability Act.

Trust Co. v. Railroad Co., 165 Fed. 2d, 806.

VII

It is important that this Court review the matter of pleading in this case, that in trials under the Federal Employers 8 Liability Act parties should not be prejudiced by improper allegations, and by the admission of proof to sustain such allegations.

The declaration in this charged that petitioner owed many duties to respondent, and that it breached said duties, and the trial court overruled demurrer to said declaration, and admitted testimony to prove these improper charges. The Supreme Court of Appeals of West Virginia decided that none of these charges were sufficient to create liability, excepting the charge that petitioner owed a duty to respondent to inspect the cars and select a proper car to go under the tipple in question, but held that all of these charges were surplusage and could only be gotten out of the declaration by a written motion to expunge them, and sustained the action of the trial court. That was error.

A declaration containing improper and prejudicial allegations should not be allowed to be given to a jury to take with them to their room, as is the custom in trials of actions at law in West Virginia, and in this case the evidence tended to prove a number of charges of said declaration, which charges the Supreme Court of Appeals of West Virginia, in its opinion aforesaid, held to be no ground for liability. The trial court further refused to instruct the jury to disregard the evidence as to such improper charges; and in deciding that there was no error in the admission of evidence or the giving of instructions the Supreme Court of Appeals of West Virginia has approved a judgment rendered on a verdict which may as well have been founded on what was held improper as on the part of the declaration which was held not demurrable.

VIII

Facts should be pleaded, and it is not sufficient to plead conclusions with no pleaded facts to sustain them.

Hogarty v. Railroad Co., 255 Pa., 236, and cases cited in the opinion.

IX

The Supreme Court of Appeals of West Virginia erred in sustaining the demurrer of respondent to Petitioner's Plea No. Two, and in refusing to permit petitioner to introduce proof before the jury of the amount it had contributed to the Workmens' Compensation Fund of West Virginia, and the amount paid from said fund to petitioner, or paid therefrom for him, and on account of the injuries for which he sued.

Title 45, Section 55, United States Code.

X

The Supreme Court of Appeals of West Virginia erred in not deciding that all inquiry as to whether respondent was, when injured, engaged in work in interstate commerce was precluded by the action of the Compensation Commissioner of West Virginia in making the award of compensation to respondent, ample proof of which appears in the record, but which petitioner was not allowed to read or have read to the jury, and which award had become final, and the benefit of which award had been enjoyed by petitioner from March 7, 1946, until the trial of said cause on November 4, 1947 (R. 68 to 72, 72), Said award was res adjudicata that respondent was engaged in intrastate commerce when injured, and was res adjudicata of every other fact essential to the making of such award.

Railroad Company v. Schendel, 270 U. S., 235.
Domiano v. Railroad Co., 161 Fed. 2d, 534.
Petroleum v. Hunt, 320 U. S., 430.

XI

If the application for an award of compensation and its receipt are not res adjudicata that respondent was in intrastate commerce, and if there was evidence enough otherwise

to justify a recovery by respondent, then petitioner was entitled to have so much credited against any finding by the jury as was paid from the compensation fund to respondent, or for his benefit. (United States Code, Title 45, Section 55).

XII

If respondent knowingly received compensation to which he was not entitled, he committed a serious misdemeanor.

> "Any person who shall knowingly and with fraudulent intent secure or attempt to secure larger compensation or compensation for a longer term than he is entitled to from the Workmen's Compensation Fund, or knowingly or with like intent secure or attempt to secure compensation from such fund when he is not entitled thereto, shall be guilty of a misdemeanor." (Code of W. Va., 1943, Chapter 23, Article 4, Section 19.)

By his demurrer to petitioner's Plea No. 2 (R. 39 & 40), respondent shows that he did not believe himself entitled to compensation, and did convict himself of a misdemeanor in order to prosecute this action against petitioner. We believe it is the rule in West Virginia that litigants can not take inconsistent positions in regard to the same matter, and that that is the general rule prevailing in the states, and in the Federal Courts as well.

> Hurley v. Hurley, 127 W. Va., 744, and cases cited in the opinion.

We do not believe that the Federal Employers' Liability Act has destroyed the virility of that rule, nor that it was intended that a plaintiff should twice recover pay for the same injury.

XIII

The Supreme Court of Appeals of West Virginia was confused as to two facts, as hereinafter shown.

ARGUMENT

The great volume of this record caused the Supreme Court of Appeals of West Virginia to be confused as to two facts:

(1) In the opinion it assumes, erroneously, that the car being placed by respondent when he was injured, had been cut loose from the engine and was traveling over the switch and side track by momentum.

(2) That there was from 22 to 23 inches of clearance between the brake wheel of "cars of average height," and the overhead timbers of the tipple, and only one inch clearance with the Norfolk and Western car (51 S. E. 2d, 109). As to these two facts there is no conflict in the evidence.

Had the car been cut loose from the engine as well as from the car next it in the train it would have been controllable wholly by respondent and the brake. It was, in fact, uncoupled from the train. That severed both the engine and car from that train. Respondent waived the engineer ahead, and climbed the ladder at the end of the car. The car was pulled past the switch; respondent threw the switch, signaled the engineer to back up and climbed the end of the car; the car was backed slowly under the tipple. A signal to the engineer would have stopped the car instantly.

The declaration says respondent had no opportunity to observe the height of the car until "shortly before said railroad car was *pushed by said engine under said tipple*" (R. 26).

Regarding the clearance, Floyd Wheeler said "Some standard sized cars, I would say there was a clearance of 22 to 23 inches *from the top of the car up to the ceiling*" (Emphasis ours) (R. 143). He says the *top of the brake wheel* of the Norfolk and Western car was 145 inches above the rail (R. 145) (Emphasis supplied). The Court judicially knows that the brake wheel sits on a staff several inches above the end of the body of the car. It is common knowledge that the top of the end of the body of some cars is described by a straight line from the top of the end of one side of the car across the car to the top of the end of the other side, so that the end of the car is exactly as high as the body, while on other cars the end of the car rises above the end of the sides of the body, and it is described by two slanting lines that at several inches above the level of the sides are joined by a straight horizontal line. But the height of the end of the car neither caused or contributed to any injury. Respondent charged it to the brake wheel. (See photo R. 61 & 62).

Respondent says the cars delivered to petitioner are "mixed up." He mentions B. and O., New York Central and Norfolk and Western (R. 88).

Respondent proves by K. K. Morey that the wheels of the car were skidding, showing the brake had been set, when Morey came to the tipple; then respondent should have stepped over on the steel ladder at his left hand, and down one step to perfect safety. Respondent says he could not ride on the steel ladder at the side of the car, because there was but eight inches of clearance betwen the car and an upright timber of the tipple. The photograph (R. 61, 63), shows the natural place to ride was on the steel ladder at the end of the car, and that it would have been foolish and foolhardy to climb around the corner of the car to the ladder at the side.

Respondent was familiar with Norfolk and Western cars; he was familiar with the tipple. He alleges in his declaration that the tipple had been used for approximately twenty years without injury to any employee, and *without danger of injury* when "cars of normal height" were used (R. 24).

Respondent testifies that all the cars delivered to petitioner were "approximately" of the same height (R. 88). If true, there was nothing about the height of the car to warn petitioner of danger to respondent. He, respondent, uncoupled the car in question from the train; he climbed its end and rode past the switch, climbed down, threw the switch, signaled the engineer to back up, and again climbed up the end of the car.

We concede assumption of risk is no defense, but the fact that respondent says he did not observe the height of this car until within 15 feet of the tipple proves, together with the other evidence, that not to note anything unusual about the car was not negligence of petitioner or its employees.

As is above shown, the Supreme Court of Appeals of West Virginia has held that every alleged duty of the petitioner, and every alleged breach of said duty is insufficient in the declaration, and of course no basis of liability, excepting the one charge of duty to "observe the height of the several cars in said 22 car train and to direct the placing of cars under said Blake tipple

which would clear said tipple without unnecessary risk to life or limb of the plaintiff or anyone serving as brakeman thereon;" (51 S. E. 2d, 110, Colume 2).

Assuming the correctness of the holding of the Supreme Court of Appeals as to the insufficiency of these statements and charges in the declaration, then it was error for the trial court to allow evidence of these improper charges to be introduced, and it was error for the Supreme Court of Appeals to refuse to set aside the verdict and grant respondent a new trial on account of such errors, for error presupposes prejudice.

If all the allegations of the declaration except as above mentioned were insufficient and demurrable and should have been stricken out on motion, the trial court erred in refusing petitioner's Instruction No. 5, which would have told the jury to disregard the part of the declaration charging a duty of petitioner to have someone walk ahead of the car as it was being placed (R. 54).

It was error of the trial court to refuse petitioner's Instruction No. 6, to disregard the statements of a duty of petitioner to have two brakemen instead of one; and to refuse petitioner's Instruction No. 7, prayed for by it, which would have told the jury to disregard all evidence of the failure to have two brakemen (R. 54, 55). It was likewise error to refuse Instruction No. 8 prayed for by petitioner, which would have told the jury to disregard the charge in the declaration to have a conductor present at the switch, and to disregard all evidence relating thereto (R. 55, 56), and to refuse Instruction No. 10, prayed for by petitioner, for the jury to disregard the averments in the declaration that it was the duty of the defendant to make rules, etc. (R. 57).

It was error for the Supreme Court of Appeals of West Virginia to approve the action of the trial court in refusing such requested instructions, and to refuse to set aside the verdict because thereof. And we believe that such action of the Supreme Court of Appeals should be reviewed and reversed by this Honorable Court.

Brady v. Railroad Company, Supra.

The Supreme Court of Appeals of West Virginia erroneously concluded and found that the Compensation Commissioner of West Virginia was without jurisdiction to award compensation to respondent. It based its conclusion on the terms of the Federal Employers' Liability Act more than on the statute of West Virginia. The powers of the Compensation Commissioner are fixed by Chapter 23 of the official code of West Virginia. Section 10 of Article 2 of said chapter defines employer and employee, and contains this proviso: "Provided, however, that this chapter shall not apply to employees of steam railroads, or steam railroads partly electrified, or express companies engaged in interstate commerce."

The Compensation Commissioner construed this proviso not to exclude railroad companies or their employees except to exclude employees engaged in interstate commerce.

The Supreme Court of Appeals of West Virginia does not apparently disagree with that interpretation, but holds that under the terms of the Federal Act plaintiff, (Respondent here), was employed in interstate commerce. (51 S. E. 2d, 113). Section 14, Article 1 of said chapter authorizes and requires the compensation commissioner to furnish blank forms of applications for benefits of compensation funds. Section 13 of said chapter and article empowers and requires the commissioner to make rules of procedure.

Section 16 makes it a misdemeanor for anyone to fail to make a report or perform a duty required by the commissioner, and makes one who knowingly makes a false report or false statement under oath, or testifies falsely guilty of perjury.

By Article 2, Section 5 of said chapter, any employer who fails to subscribe to the Workmen's Compensation Fund and pay required premiums into the same is deprived in a suit by an employee of the common law defenses of contributory negligence, assumption of risk and the fellow servants rule, and of the benefits of the compensation statute.

Article 4, Section 15 of said chapter provides for the filing by an employee of applications for payments from the compen-

sation fund to be made on forms provided by the commissioner, and within six months from the date of his injury, and extends that time if the employer does not report the accident as he is required to do.

Section 19 of Article 4 makes it a crime to knowingly and fraudulently secure or accept compensation to which the applicant is not entitled, as above shown.

Article 5, Section 1 of said chapter confers upon the commissioner full power and authority to hear and determine all questions within his jurisdiction; and when he makes or refuses to make an award to notify by writing the employer and the employee or dependent of a deceased employee, etc., and that the notice he gives shall state the time allowed for making objection to his finding, and that his action shall be final unless the employer or claimant objects in writing to the finding. If objection is made, the commissioner sets a time, within thirty days from the making of such objection, for hearing evidence, and notifies both employer and claimant at least ten days in advance of the hearing.

Section 3 of Article 5 of said chapter provides for an appeal from the action of the commissioner by either the claimant or employer, to an appeal board provided for by statute. The decision of the matter by that board is final unless appeal is taken as is authorized by statute, to the Supreme Court of Appeals of the state.

Respondent filed his application under the provisions of the statute (R. 67, 68); his attending physician made report as in such case required (R. 68); the commissioner made the award of $18.00 per week, and notified respondent and petitioner (R. 69).

Either respondent or petitioner could have appealed to the appeal board, and then to the Supreme Court of Appeals of West Virginia. Neither of them prosecuted such an appeal.

At that time petitioner may have believed he was entitled to the award; he can not pretend that he so believed after he instituted his action for damages.

The commissioner had to first determine the matter of his own jurisdiction. We believe he was empowered to make that determination, and that the person who set the machinery in motion to obtain the adjudication by the commissioner, and who obtained the benefit of his action, will not be heard to claim that such action was void; and we believe that the Supreme Court of Appeals of West Virginia was in error in holding that the provisions of the Federal Employers' Liability Act rendered the action of the commissioner void. Courts will certainly not construe a statute to work a manifest injustice unless compelled to do so.

We again respectfully urge that the writ of certiorari prayed for should be granted, and that the judgment of the Supreme Court of Appeals of West Virginia complained of should be reviewed and reversed.

HARRY H. BYRER,
F. E. PARRACK,
MELVIN C. SNYDER,
CHARLES V. WEHNER,

Counsel for Petitioner.

HARRY H. BYRER,
F. E. PARRACK.